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APR 24 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 903

RISS & COMPANY, INC.,
Petitioner,

v.

THE ASSOCIATION OF WESTERN RAILWAYS, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, EASTERN RAILROAD PRESIDENTS CONFERENCE, CARL BYOIR & ASSOCIATES, INC., and THE PENNSYLVANIA RAILROAD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

Petitioner, Riss & Company, Inc., prays that a Writ of Certiorari issue to review a judgment entered by the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case on January 25, 1962.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 299 F. 2d 133, and printed in the Appendix at page 142a. The Order of the District Court directing entry of judgment on the jury verdict is unreported. It appears at page 138a of the Appendix. The Order of the District Court directing entry of judgment for attorney's fees is unreported. It appears at page 141a of the Appendix. The opinion of the District Court, printed at page 40a of the Appendix, is reported at 187 F. Supp. 306. The Orders of the United States Court of Appeals for the District of Columbia Circuit on petitions to it for Writs of Certiorari are reported at 267 F. 2d 657 and 267 F. 2d 659, and are printed at pages 1a and 38a of the Appendix. The opinion of the District Court on remand pursuant to the Order of the Court of Appeals at 267 F. 2d 657 is reported at 170 F. Supp. 354, and printed at page 4a of the Appendix.[1] The Order of this Court denying a Motion for Leave to File Petition for Writ of Certiorari to review the Order of the District Court on remand is reported at 361 U. S. 804.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 25, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Did this Court's decision in **Eastern Railroad Presidents Conference v. Noerr Motor Freight** overrule the "lawful act" antitrust conspiracy doctrine, when the lawful acts include unsuccessful attempts to influence legis-

[1] The opinions and orders of the Court of Appeals and the District Court, together with a verbatim transcript of the trial Court's complete, final instructions to the jury, are reprinted for the Court's convenience in a separate Appendix volume.

lation and public law enforcement as a part of a conspiracy consummated through use of concerted price-cutting?

2. Did the Court of Appeals deprive a Plaintiff of its constitutional right to a jury trial in directing the entry of a final judgment against it upon a verdict "For Plaintiff," but contrary to lawful instructions, after setting aside a subsequent verdict returned in accordance with a lawful supplemental instruction?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C., §§ 1 and 2; Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C., § 15; and the Seventh Amendment to the Constitution of the United States. These provisions are as follows:

Section 1 of the Sherman Act, 15 U. S. C., § 1 (in pertinent part):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U. S. C., § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U. S. C., § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Seventh Amendment to the Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT.

Petitioner, Riss & Company, Inc. ("Riss"), Plaintiff in the jury trial below, is an interstate common carrier by motor vehicle. Prior to 1956 Riss was one of the largest motor carriers of munitions in the United States. Defendants below were 23 railroads, 4 railroad associations, and a public relations firm. The District Court's jurisdiction was invoked under Sections 4 and 12 of the Clayton Act, 38 Stat. 731, 736, 15 U. S. C., §§ 15 and 22. The complaint, as supplemented, charged that defendants had conspired, in violation of Sections 1 and 2 of the Sherman Act, to monopolize, and to eliminate the competition of Riss in, the business of transporting munitions for the United States; that the objectives of that predatory conspiracy had ultimately been achieved by defendants' concerted price-cutting action,[2] pursuant to that conspiracy, in 1955 and 1956; and that those price cuts had virtually destroyed Riss's munitions transportation business.

After some 120 days of trial, the jury ultimately returned a $75,000 verdict for Riss against the five Respondents, and acquitted the remaining defendants. The trial Court entered a $225,000 judgment for Riss on November 8, 1960. Respondents here appealed from that judgment.

After entry of judgment, but before the filing of appellate briefs, this Court handed down its opinion in **Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight et al.**, 365 U. S. 127 (1961).

The Court of Appeals, directing entry of judgment for Respondents, reversed a judgment that necessarily de-

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[2] All of the involved prices quoted by the defendant railroads, through their associations, for transportation of munitions were established under Section 22 of the Interstate Commerce Act, 49 U. S. C., § 22; were not tariff rates, and were not, during the relevant period (1955-57), either filed with or otherwise received by the Interstate Commerce Commission.

pended upon the jury's conclusion, under the trial Court's charge, that Riss had been injured by the defendants' concerted predatory price-cutting.

The Court of Appeals ignored the evidence supporting that conclusion, and rested its decision instead upon consideration of defendants' unsuccessful pre-rate cut efforts to attain their monopoly goal through legislative and law enforcement activities, holding that this Court's opinion in **Noerr** in effect overruled the "lawful act" doctrine of **American Tobacco.**[3] This result was a consequence of the Court's conclusion that the trial Court erroneously instructed the jury that those acts might be held unlawful if found to be a part of an overriding predatory conspiracy contemplating, and consummated by, destructive concerted price cuts. The Court of Appeals held, moreover, that the mere presentation of that evidence to the jury precluded any judgment for Riss, as a matter of law, "irrespective of any other evidence."

The Court of Appeals also rested its reversal upon its view of the events immediately preceding the jury's $75,000 verdict for Riss. The trial judge had instructed the jury that it could not return a verdict for Riss unless it found that Riss's business had been injured by the defendants' 1955-56 rate cuts and that those rate cuts were a part of the defendants' unlawful conspiracy. After unsuccessfully seeking further instructions as to whether they could return a verdict for Riss on the conspiracy issue without assessing damages, the jury was unable to agree on a verdict and asked to be discharged as "hung". Finally, after 10 days of deliberation, the jury attempted to return a form of general verdict "For Plaintiff" against the five Respondents, but assessing no damages. It acquitted the remaining defendants. The verdict was on its face con-

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[3] *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

trary to the trial judge's instructions, and he refused to accept it. He then instructed the jury to return a verdict for all Respondents or a verdict for Riss with a damage award in some amount. The jury retired and, after further deliberation, returned a $75,000 verdict for Riss against the five Respondents.

In the Court of Appeals' view, the trial judge had no discretion to require the jury to return a verdict in compliance with his instructions and the law applicable to a general verdict. The Court of Appeals, completely ignoring the manner in which the issue had actually been submitted, treated the initial form of verdict as answers to special interrogatories never given to the jury.

The Court of Appeals rationalized the jury's irrational original verdict into a verdict for Respondents. Its position was that judgment should have been entered for Respondents on the initial verdict, which defied the trial Court's instructions, instead of upon the verdict that finally did comply with them.

A. Proceedings in the Trial Court.

The "conspiracy" basic to Riss's case was a "conspiracy which contemplated, if necessary, the use of rate reductions."[4] No one disputed Riss's evidence that concerted reductions were in fact effected by defendants, whose evidence moreover proved that cost was the overall determinant in awarding munitions traffic.[5] The evidence showed a precipitous drop in Riss's business following defendants' rate reductions, and defendants' congratulatory

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[4] Charge to the jury, Appendix, p. 90a.

[5] See, e.g., J. A.* 1813-14, 2013-16, 2068-69, 2100.

* "J. A." references are to pages from the Joint Appendix filed in the Court of Appeals.

correspondence reporting the virtual elimination of motor competition.

This case was tried, and the jury instructed, on the basic proposition that Riss might prevail only if the jury found that two or more defendants had conspired to eliminate Riss's competition, and had attempted to secure for the railroads as a group at least 90% of the Government's ammunition and explosives traffic, without regard to the merits of any railroad or group of railroads as competitors for such traffic.

The jury was instructed that an essential element of participation was knowledge of this unlawful purpose; that in order to hold any defendant it was necessary for Riss to prove knowledge of the conspiracy's existence, including knowledge that the means employed might ultimately extend to concerted price-cutting action, which the instructions treated as the only injurious act for which Riss could recover damages.

The jury was explicitly instructed that Riss could not recover damages for the consequences of any overt act other than the concerted price cuts effected in 1955-56. It was also instructed that it could award no damages to Riss for injuries to it from those cuts, unless it first found that Riss had established by a preponderance of the evidence that they were effectuated pursuant to a conspiracy to eliminate Riss as a competitor for munitions traffic in order to secure a monopoly (Appendix, pp. 90a, 91a, 98a).

Riss introduced evidence, antedating all of the defendants' overt acts, which showed their intent concertedly to achieve a monopoly of munitions traffic for the railroads.

Riss also introduced evidence showing a variety of unsuccessful efforts by defendants, prior to 1955, to attain their monopoly goal by means short of price reductions. Riss had conceded in its opening statement that those

efforts were unsuccessful (J. A. 1115-16). However, this evidence did demonstrate the sequence of developments, from the 1950-51 inception of the conspiracy to the 1955-56 rate cuts, which impelled defendants to resort to the ultimate price weapon and thus to succeed where earlier efforts had failed. Those pre-1955 activities included direct solicitation of military shipping agencies for shipment of 90% of munitions traffic by rail regardless of price or service considerations; creation of a concerted nationwide anti-munitions-trucking publicity campaign soliciting opposition to, and advocating denial of, the then-pending application of Riss before the Interstate Commerce Commission for permanent authority to transport munitions;[3] the solicitation of state legislatures and state law enforcement officials to take action that, if successful, would have seriously injured, if not destroyed, Riss's business.

By judicial admissions made before trial, and read to the jury by defendants, Riss admitted that each and every overt act claimed to have been carried out for the purpose of effectuating the conspiracy charged, including the allegedly monopolistic price-cutting, was entirely lawful in and of itself (Appendix, pp. 49a-53a). The jury was so instructed (Appendix, pp. 77a, 81a-83a, 89a-90a, 93a). It was also told that no Sherman Act illegality could attach to any of those acts except as the jury found they might have been carried out in furtherance of an independently established, concerted monopolistic intent (Appendix, pp. 81a-82a, 90a-93a).

The issues thus presented to the jury were (1) whether there was an independently proven intention by two or

[3] Riss claimed, and attempted to show at trial, that defendants' massive publicity campaign had directly injured its business among commercial shippers. However, the trial Court held that Riss had failed to make a *prima facie* showing of any such direct injury, and gave peremptory instructions to the jury that Riss could in no event recover damages asserted to result directly from defendants' publicity campaign (Appendix, p. 98a).

more of the defendants to monopolize the munitions transportation business; (2) whether Riss had proved overt acts that demonstrated the carrying out of the conspiracy with such a purpose; (3) whether the concerted price-cutting had been shown to be a part of that conspiracy; (4) whether this price-cutting had in fact injured Riss's business; and (5) if so, in what amount.

1. The Independent Evidence of Predatory Intent.

The pre-rate-cut activities of defendants were largely determined by the so-called War Materials Reparations Cases (**United States v. Ahnapee & Western Ry. Co. et al.**, 294 I. C. C. 5), which were pending before the Interstate Commerce Commission throughout the relevant period until early 1955.

The **Reparations Cases** were suits filed by the United States against the railroads before the ICC in 1947. In pertinent part they sought monetary damages for allegedly unreasonable high charges for World War II rail transportation of munitions. The overcharges claimed by the United States were estimated to be $2,000,000,000 (294 I. C. C. 5, 13). The United States claimed that the highest reasonable rate for this transportation was 55% of the first class rail rate, whereas the railroads' World War II rates on munitions were generally at 65% of first class. The railroads' defense was that 65% of first class was a reasonable rate basis because of the extreme hazards involved in transportation, and the high value of munitions. The railroads believed that rate reductions deep enough to remove the motor carriers as competitors, if made while the **Reparations Cases** were pending, would provide the ICC with a basis for determination that the 65% level was indeed unreasonably high (J. A. 1824-26, 3465-66, 3629-32).

These facts were before the jury as background to and part of the proof of defendants' intent to monopolize the munitions business; to do so by means short of concerted rate reductions, if possible, but to use that weapon should other means fail.

The foundation document of Riss' proof of illegal purpose was the so-called "Kerr Memorandum" (Plaintiff's Exhibit 40, J. A. 311-19). Representatives of TEA[7] and other railroad rate associations[8] were present at a meeting in March 1950 with traffic officials of the Army, Navy, and General Services Administration. One of the rail representatives (Kerr, Chairman of SFA) reported that meeting to the other railroad rate bureau chairmen in attendance, in a memorandum he marked "Confidential" because "for obvious reasons I had considerable hesitancy putting down in writing what transpired at the conference." What transpired was that the rail representatives had demanded that the railroads be given 90% of available traffic, regardless of such normal competitive considerations as price and service. In Kerr's words, "I repeatedly pointed out that . . . the rail carriers are entitled to 90% or more of the Government traffic instead of less than 70% . . . in other words, the trucks should have included within their share of 10%, all traffic handled regardless of their rate levels." . . .

The Government traffic men indicated that they had no authority to comply with the railroads' demand; that it

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[7] Respondent Traffic Executive Association—Eastern Railroads, the rate bureau of railroads in Eastern territory. Respondent Pennsylvania was a member of TEA, as were the 4 other Eastern railroad defendants below. All five were also members of Respondent Eastern Railroad Presidents Conference ("ERPC").

[8] Western Traffic Association ("WTA"), the Western railroads' rate bureau, and Southern Freight Association ("SFA"), the Southeastern railroads' rate bureau.

"would have to be pursued and decided at top levels." Kerr therefore suggested that "the time may have come for discussion at 'top levels' with a view of obtaining for the railroads a proper share of the available traffic of the defense establishment."

The proof of overt acts relied upon to show that the defendants attempted to achieve this illegal result by concerted action may be summarized as follows:

The railroads, wary of the pending **Reparations Cases**, did seek a grant of monopoly from "top levels" of the defense establishment, but were unable to overcome "the great difficulties that [stood] in the way of negotiating to a conclusion an arrangement which [would] keep the traffic to the rails where it properly should be and still protect the carriers from repetition of the Reparations cases" (J. A. 3397).

They then turned to other means to make a reality of the "principle" that munitions transportation "is one monopoly that should be given back to the railroads" (J. A. 3411).

Riss, the largest of the railroads' motor carrier competitors for munitions traffic, had pending before the ICC an application to make permanent its long-standing temporary authority to transport explosives, principally in Eastern territory. Under that temporary authority and its Western permanent authority, Riss could then transport munitions over a network of routes in a roughly triangular area marked by the points of Boston, Denver and Ft. Worth-Dallas.

A hearing before the ICC on the application of Riss and a number of other carriers was scheduled for September 17, 1951. At a meeting of all interested railroads in advance of the Riss hearing, Respondent AWR's chief coun-

sel pointed out the importance of the Riss application proceedings in relation to railroad rate policies as dictated by the **Reparations Cases** (J. A. 3123). It was then agreed to create public hostility to munitions trucking by a publicity campaign designed (1) to influence an adverse ICC decision on the Riss application, (2) to intimidate responsible Defense Department officials into taking explosives shipments off the highways,[9] and (3) to force motor carrier applicants to withdraw from the ICC proceedings[10] (J. A. 3121-38). They knew that the Eastern temporary authority of Riss, their principal competitor, would terminate with the withdrawal or denial of its permanent authority application,[11] and thus eliminate any need to consider rate reductions (J. A. 3463).

Execution of the campaign was jointly undertaken by the railroads and their associations. The principal actors

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[9] In response to one railroad president's stated fear that a successful "defense" of those cases would cause the Defense Department itself to go into the explosives trucking business, the President of the Association of American Railroads ("AAR"), who had been kept informed of plans relating to the "defense" by AWR's Chairman (J. A. 3126, 3167), said in part:

> "*The Department of Defense is very sensitive to public opinion* and if the current negotiations for better procedure on Section 22 rates work out and the opposition to the trucking applications is successful, I should not be surprised if the Department of Defense would hesitate to go into very extensive trucking operations over the highways . . ." (J. A. 3163, emphasis added); *see also* J. A. 3454 and 3709).

[10] Several applicants, other than Riss, did in fact withdraw as a result of the campaign (J. A. 3337-38).

[11] No final decision was ever made by the ICC on Riss's application. On March 23, 1959, well after the end of the damage period in this case, Riss notified the ICC that it was withdrawing its permanent application for explosives authority because the effect of the railroads' concerted 1955-56 price reductions had destroyed any economic justification for further prosecution of that case. It had been pending before the ICC, following remand by this Court (*Riss & Co. Inc. v. U. S. et al.*, 341 U. S. 907 (1951)), for over eight years.

in the East were the Pennsylvania; TEA, the Eastern railroad's rate bureau; and Carl Byoir & Associates, Inc. ("Byoir"), the public relations agent of ERPC; while AWR's legal and public relations staff conducted operations in the Western territory allocated to them (J. A. 3153-58, 3172-75, 3180-86, 3214-26, 3270-71, 3278-81, 3306, 3327, 3380-83). They combined in a joint effort, described in their owns words, "literally to run [munitions truckers] right out of this business" (J. A. 3286); to, "keep the pressure on Riss in every way, and particularly as regards the trucking of explosives" (J. A. 3380); to "get [Riss] explosives—hauling trucks off the road" (J. A. 3260). Coordination of the overall campaign was effected through a "Special Interterritorial Anti-Riss Committee" (J. A. 3295).

As a part of that joint effort, attorneys for AWR and the Pennsylvania drafted a form of state statute that would effectively ban motor transportation of explosives. Their bill was introduced in the legislatures of 13 states in 1953, but was enacted in none of them (J. A. 1391-93, 3377-78, 3427-29, 3661-62).

After failing in their efforts to obtain legislative action and their campaign to influence ICC action, the railroads in early 1954 turned again[12] to direct demands of the shipper for a monopoly share of munitions traffic. Kerr of the SFA reported on renewed "presentations" by himself and the Chairmen of TEA and WTA to the Department of Defense official in overall charge of military transportation policy. The railroad representatives said "very frankly" that the railroads would not reduce the level of munitions rates so long as the **Reparations Cases** were pending, but that even if those cases were dismissed,

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[12] See pp. 11-12, *supra*, and J. A. 3464.

> "... he should keep in mind that the carriers regard the present basis (65 percent of old first-class rates) as very low. . . . We said it would be suicidal for the rails now to reduce these rates. . . ." (Emphasis added.)

Then, Kerr reported, "we opened up the matter of routing of military traffic via motor versus rail," and again demanded a monopoly share of the traffic without regard to the railroads' competitive merits (J. A. 3465-68).

2. The Evidence Of Defendants' Concerted Price-Cutting And Its Relation To Their Monopolistic Intent.

In February 1955 the Interstate Commerce Commission decided the **Reparations Cases** (294 I. C. C. 5), sustaining the railroads' position that [illegible]% of the first class rail rate was not an unreasonably high level for rail transportation of munitions.

The railroads' rates on munitions had remained constant at that general level since World War II. The Department of Defense had continuously and unsuccessfully sought a reduction since the end of the war (J. A. 1824-26, 2034, 3123, 3737). Following the decision in the **Reparations Cases**, the railroads again rejected a Defense Department proposal (J. A. 3487-94). Instead, they reduced the rates to a level substantially lower than that proposed. Effective on October 20, 1955, rates on munitions moving within Eastern territory were reduced to 40% below the pre-existing general level (J. A. 3497).

Within the territory generally West of the Mississippi, and on movements between Western and Eastern points, the railroads made less drastic reductions (J. A. 3498-99).

In Southern territory, where Riss did not operate, rates were not then reduced (J. A. 3501).

The 40% reduction was restricted to the Eastern area, where it had maximum impact on Riss's operations under its existing temporary authority and potential permanent authority (J. A. 3145-46). TEA's Assistant Chairman in Washington was able to report that the railroads moved over 86% of all explosives shipments within the Eastern territory between December 1, 1955, and February 17, 1956 (J. A. 3681). This contrasted sharply with approximately 59% during 1954 (J. A. 3481-82).

The motor carriers, including Riss, were able to meet the reductions in the West. Data circulated to the Western railroad representatives showed that in January 1956, motor carriers had 63% of the Army and Air Force business in the areas in which the less severe reductions applied. In that same month the railroads had obtained almost 95% of the business in the East (J. A. 3676).

With full knowledge of the success the deeper Eastern rate cuts had achieved in eliminating motor competition, the Western and Southern railroads cut to that same level[14] in March and early April of 1956 (J. A. 3516-19, 3528-33).

This reduction, like the preceding Eastern cut, was substantially below any Government proposal (J. A. 3487-88).

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[14] The Chairman of WTA had earlier pointed out to his Washington assistant that normal business considerations should preclude such reductions. He said, in an August 1955 letter:

> ". . . We would be far better off handling 25% of the 1956 traffic at our normal rates than we would be to handle 75% or better, on a basis of [a 40% rate reduction]. On [that] basis . . . many of our lines would have to increase their ammunition traffic by 100% or better. There is no possibility of doing that . . ." (J. A. 3691).

The 40% reduction was applied by the Western railroads only on traffic moving between points, generally, east of a north-south line through the United States at Denver, Colorado, thus extending the cuts to all areas in which Riss could operate directly. They were never extended from Denver west to the Pacific Coast, where Riss was not a direct competitor (J. A. 1573).

WTA's Washington representative reported to his Chairman that the railroads had obtained 73,000,000 of the 87,000,000 pounds (approximately 84%) of explosives shipped by the Army and Air Force in July 1956 between the points east of Denver to which these additional 40% cuts had applied (J. A. 3693-94). WTA's representative noted that these figures "clearly [showed] the current trend in the handling of the ammunition traffic as the result of revisions in rates. . . ." (J. A. 3695).

3. The Impact of the Concerted Rail Rate Reductions Upon Riss's Business.

Riss introduced into evidence a complete record of its entire munitions transportation business for the period 1949 through 1957, the last year of the damage period. That evidence showed that in 1954 Riss transported over 194,000,000 pounds of ammunition and explosives, from which it derived revenues over $3,600,000.[15] 1955 revenues remained almost constant. In 1956, following the rate cuts, effective in the East on October 20, 1955, and in the West in March and April 1956, volume and revenue fell to less than half the 1954 or 1955 amounts. By 1957, the first full year after the rate reductions, volume fell to

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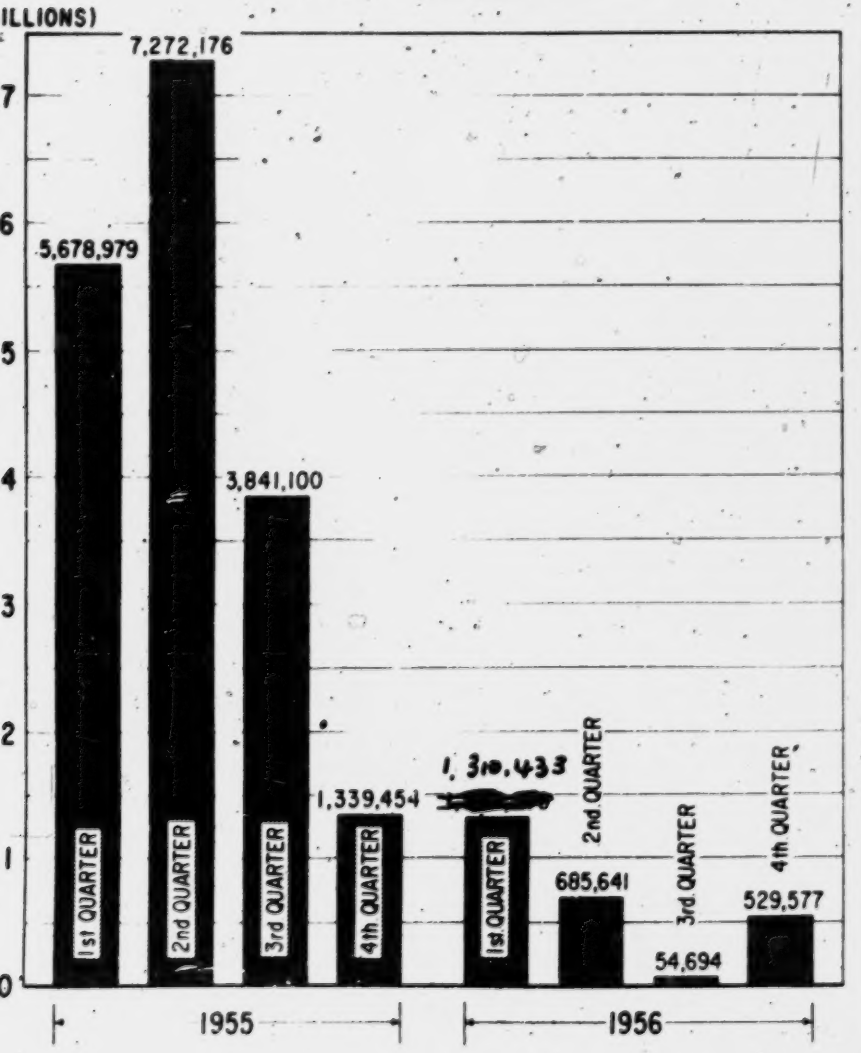
[15] An order of the ICC placing a restrictive interpretation on Riss's temporary authority had become effective at the end of 1953. The period beginning 1954 and thereafter covered explosives transportation carried on within the limitations imposed by that order.

less than 7%, and revenues to less than 10%, of the 1954-1955 levels (J. A. 3617).

The impact of those cuts was immediately apparent. In Eastern territory the reduction went into effect in October 1955. In the last quarter of that year, Riss moved approximately 1/3 the volume of explosives it had moved in the preceding quarter. Revenue fell accordingly. In the full year 1956, Riss moved roughly 15% of the explosives tonnage it had moved during 1955 (See Plaintiff's Exhibit 215, facing this page).

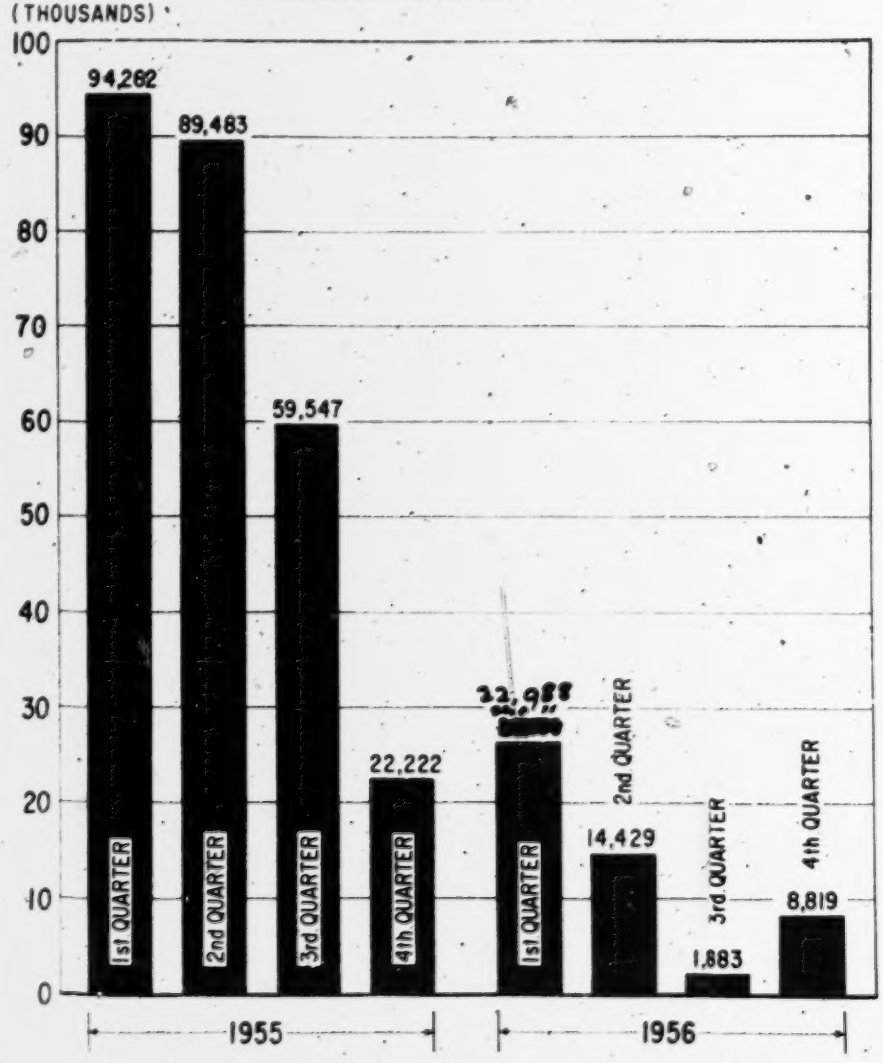
RISS WEIGHT (in pounds)

GOVERNMENT AMMUNITION AND EXPLOSIVES WITHIN EASTERN TERRITORY



RISS REVENUE (in dollars)

GOVERNMENT AMMUNITION AND EXPLOSIVES WITHIN EASTERN TERRITORY

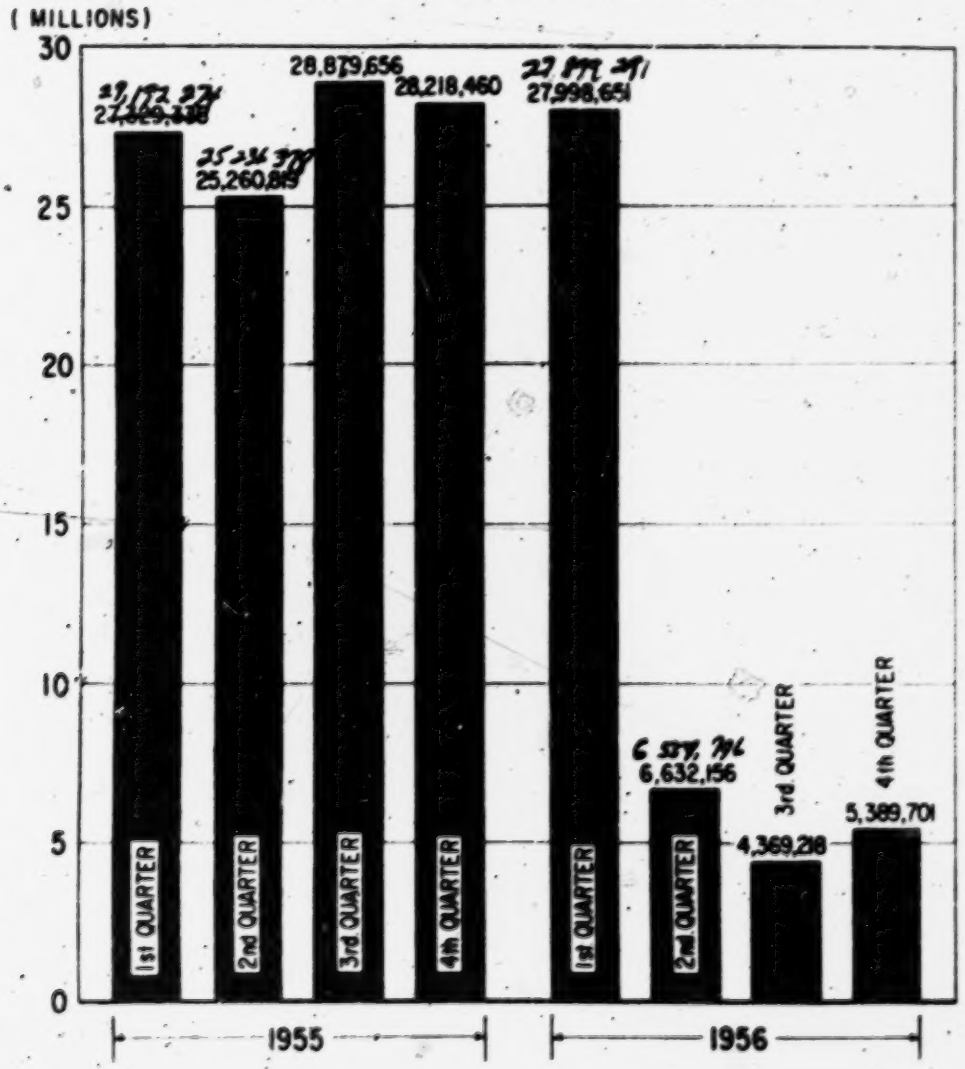


Plaintiff's Exhibit 215

The same impact was experienced by Riss following the adoption of the 40% cut in the Western area. Riss tonnage in this area ranged between 25 and 29,000,000 pounds per quarter in 1955 and the first quarter of 1956. In the second quarter of 1956, however, when the 40% rate cuts were effective in the West, volume fell to 6,500,000 pounds. Riss revenues for munitions transportation in this area for the last three quarters of 1956 were less than 19% of those received for the last three quarters of 1955 (See Plaintiff's Exhibit 216, facing this page).

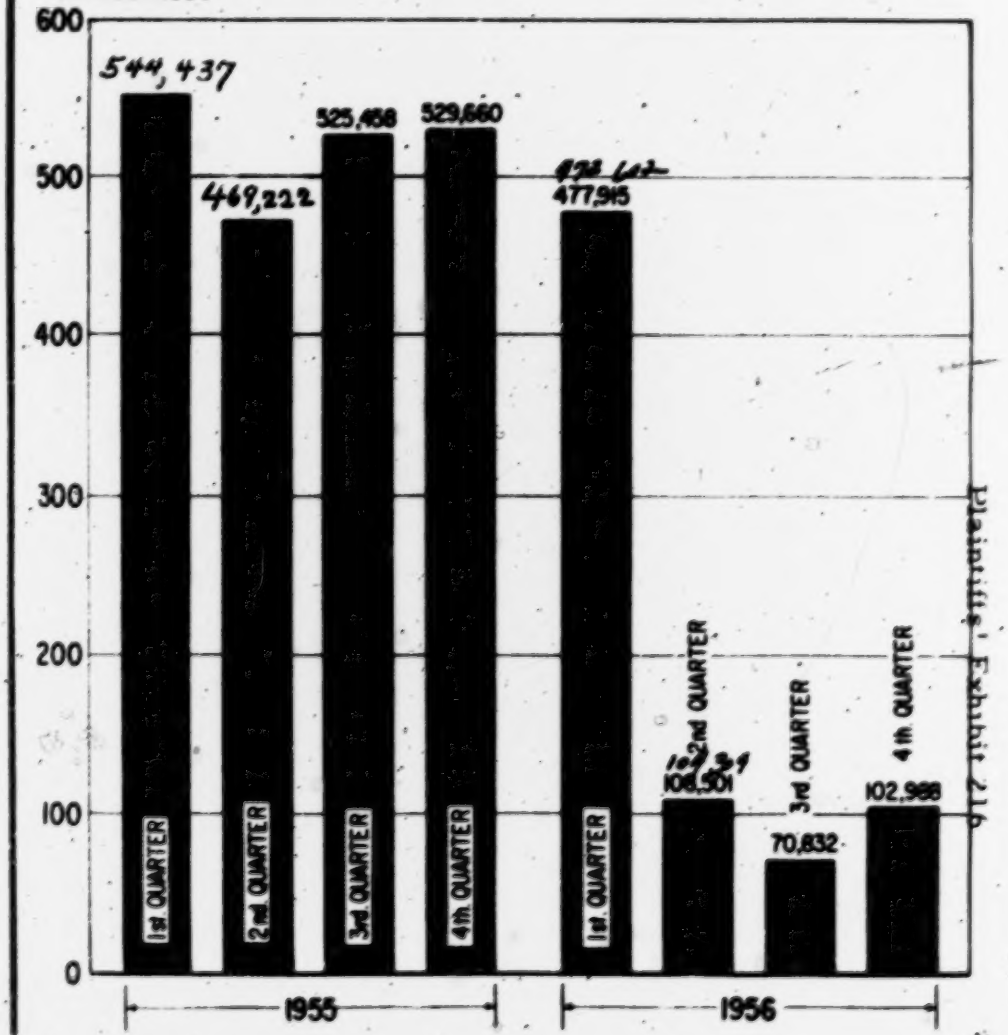
RISS WEIGHT (in pounds)

GOVERNMENT AMMUNITION & EXPLOSIVES TO, FROM AND WITHIN ALL TERRITORIES EXCEPT, (1) WITHIN EASTERN AND (2) TO AND FROM MOUNTAIN PACIFIC AND TRANSCONTINENTAL TERRITORIES



RISS REVENUE (in dollars)

GOVERNMENT AMMUNITION AND EXPLOSIVES TO, FROM AND WITHIN ALL TERRITORIES EXCEPT, (1) WITHIN EASTERN AND (2) TO AND FROM MOUNTAIN PACIFIC AND TRANSCONTINENTAL TERRITORIES



The rate cuts had accomplished their purpose—the elimination of Riss & Company as a competitor of the railroads for Government munitions traffic.

4. The Nature of the Evidence of Damages to Riss Resulting From the Concerted Rail Rate Reductions.

As a basis for its estimate of damages to Riss, and in addition to the evidence of injury outlined above, the jury was presented with a comprehensive financial history of Riss and its affiliates; with the 1953-1957 operating history of Riss's six principal competitors; and with the operating results of all Class I motor carriers of property in the United States, as a group.

That evidence provided the ba[illegible] for differing conclusions by two Riss wit[illegible]esses and two witnesses for defendants respecting the amount, and cause, of the undisputed substantial reduction in Riss's value as a going business between various selected base dates and the close of the damage period (January 1958).

One of defendants' experts introduced a study showing that Riss and its affiliates had profits, as a unit, in each year through 1955, and then sustained operating losses of $1,400,000 in 1956 and 1957, following the railroad rate cuts (J. A. 3833). One of Riss's witnesses, an expert in the evaluation of closely held corporations, testified that if Riss had kept pace with intercity motor freight carriers as a group from the base period 1949-1950, its value as a going concern in January 1958, would have been over $3,000,000 instead of less than $500,000 (J. A. 1716-46, 3663-73). Defendants' expert testified that Riss's expert should have chosen 1948-1949 as appropriate base years for his study. Using the earlier base period, and the evaluation techniques of Riss's expert, defendants' witness

recomputed Riss's January 1958, value as a going business (J. A. 2628-29, 4178).

As one of respondents' counsel pointed out to the jury in his closing argument, recomputation showed a loss of going concern value to Riss in the amount of $75,000 (Appendix, pp. 53a-54a). The jury returned a verdict for Riss in that amount.

5. Proceedings Relating to the Jury Verdict.

The trial court instructed the jury to return a general verdict on a form provided each of the jurors[16] immediately prior to their retirement. Appropriate blanks were provided for writing in a verdict as to each defendant; there followed, at the foot of the form:

> "If your verdict is in favor of the plaintiff against two or more of the defendants, what is the total amount of your verdict? $....."

The trial court instructed the jury:

> ". . . When you have agreed upon a unanimous verdict, the foreman should write in the blank spaces 'For the Plaintiff' or 'For the Defendant.'
>
> ". . . If your verdict is against . . . the plaintiff . . . as to all of the defendants, it will not be necessary to answer this last question . . .: '. . . what is the total amount of your verdict'?" (Appendix, pp. 105a-106a).

The jury then retired for deliberation, having with them a copy of the trial Court's charge (Appendix, pp. 111a, 114a).

On the ninth day of deliberation, the jury sent the following note to the trial judge:

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[16] That form of verdict, as ultimately completed by the jury, is set out in the Appendix, page 137a.

"We have a hypothetical question. If the jury should agree there was a conspiracy and voted for the Plaintiff but agreed the Plaintiff was entitled to no monetary damages, would this be an acceptable verdict to the Court"? (Appendix, p. 108a).

Counsel for both sides were convened by the trial judge, and their views solicited respecting an answer to the jury's inquiry. Riss's response was that the hypothetical question "could only be answered correctly by a flat unequivocal no" (Appendix, pp. 110a, 113a). Counsel for Respondents could not agree whether a verdict as hypothetically suggested would constitute (1) a verdict for Riss with nominal damages or (2) a verdict for defendants; whether it was the Court's function to accept such a verdict if returned, and thereafter to determine if it was to be construed as a verdict for Riss or a vindication of defendants (Appendix, pp. 108a-112a).

The trial judge then stated to counsel that, if the jury were to bring in a verdict for "Plaintiff against any ten Defendants, and they say no damages, the Court would have to send them back out and say, I cannot accept this verdict . . ." (Appendix, p. 112a). He concluded, however, that he would not answer a hypothetical question, and so informed the jury, without objection (Appendix, pp. 114a-115a).

Late that same day the jury reported to the trial judge that it was unable to reach a unanimous verdict (Appendix, p. 115a). The trial judge did not discharge the jury, but directed it to continue deliberation in an effort to attain unanimity (Appendix, pp. 118a-119a).

The jury then attempted to return a form of verdict **"For Plaintiff"** against each of the five Respondents, but showing the dollar amount of damage to Riss as **"$ None"** (Appendix, pp. 119a-121a). When the jury returned that

verdict, manifestly contrary to the judge's instructions, Riss moved for a mistrial (Appendix, pp. 128a, 131a). Respondents' counsel, anticipating the return of a verdict in their favor or for nominal damages only, made no motion for a mistrial (Appendix, pp. 125a-128a). The trial Court denied Riss's motion, and further instructed the jury to correct their apparent failure to "[understand] the Court's charge on the question of damages" (Appendix, pp. 129a-130a). The jury, again properly instructed, returned a verdict of $75,000 for Riss (Appendix, pp. 134a-136a).

Neither side moved for a mistrial, before or after judgment on that verdict was entered for Riss in the amount of $225,000 on November 8, 1960 (Appendix, p. 138a). By order entered March 20, 1961, the trial Court awarded Riss $112,500 as a reasonable attorney's fee for some 480 man-days spent by Riss's attorneys in trial, depositions, and Court arguments, and for over 13,000 hours of additional work in preparation of the case for trial (Appendix, p. 141a).

B. The Decision of the Court of Appeals.

From the judgments awarding damages and attorney's fees to Riss, Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, on the ground that judgment should have been entered in their favor. Riss filed no cross-appeal.

After entry of judgment in the District Court, and before appellate briefs were filed, this Court handed down its decision in **Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight et al.**, 365 U. S. 127 (February 20, 1961). That decision reversed decisions below holding antitrust defendants liable on facts related to, but significantly different from, those involved here.

In **Noerr**, this Court agreed with the lower Courts' "basic construction of the Sherman Act . . . that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U. S. 127, 135.

But this Court held that such attempts are not rendered unlawful under the Sherman Act by proof that defendants' intent, in seeking legislative or law enforcement action, is to destroy competitors. It indicated, however, that if the evidence had supported a finding of purpose, independent of efforts to obtain legislative and law enforcement action, directly to injure the plaintiffs, that evidence would "take this case out of the category of those that involve restraints through governmental action." 365 U. S. 127, 142.

The Court of Appeals here had before it the trial record containing evidence of the fact, purpose, and effect of defendants' concerted price cuts. It also had the trial Court's instructions that the jury could under no circumstances return a verdict for Riss unless it found that Riss had been injured by price reductions effected pursuant to a conspiracy established by evidence apart from mere proof of defendants' concerted acts (Appendix, pp. 89a-91a, 98a).

In published decisions disposing of interlocutory appeals taken by certain defendants from pretrial orders in this case,[17] the Court of Appeals had previously held that the

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[17] See *Atlantic Coast Line Railroad Company, et al. v. Riss & Company, Inc.*, 105 App. D. C. 380, 267 F. 2d 657 (1958), and 105 App. D. C. 382, 267 F. 2d 659 (1959) (Appendix, pp. 1a, 38a). In the second of those decisions, the Court of Appeals had refused to review the District Court's conclusion that the rate reductions were "an integral part" of the conspiracy; but that the dominant issue in the case was the existence of the predatory conspiracy itself (Appendix, pp. 24a-25a).

In a later motion for leave to file a petition for common law writ of certiorari (No. 156 Misc., October Term 1959; denied 361 U. S. 804), certain defendants below had argued to this Court, that the rate cuts were the controlling issue.

intent and effect of the defendants' concerted price reductions was a decisive factor in this case. It plainly indicated in those decisions its adherence to the view that Riss's factual allegations, if proven, would make out a Sherman Act violation squarely within the lawful act doctrine.

The Court nevertheless on this appeal entirely ignored the foregoing proof, and treated as the controlling factor a quantitative evaluation of the record as showing that:

> ". . . the complaint and the evidence were largely **though not entirely** concerned with efforts of the defendants to influence legislative and administrative action."

From this clearly inadequate summary of the record before it, the Court then erroneously concluded that

> "**The principal question of law was whether the Sherman Act condemns such efforts** when they are jointly made for the purpose of destroying or restricting competition."

The Court then proceeded to ignore completely what the District Court had actually told the jury, in the following misstatement of the trial judge's instructions:

> "The District Court answered this question in the affirmative and instructed the jury accordingly."

This Court's opinion in **Noerr** was then misapplied by the Court of Appeals to the hypothetical record just created:

> "The Supreme Court held, contrary to the District Court's instructions to the jury in the present case, that joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, even if its purpose is to destroy competition and even if deceitful propaganda is used. **Irrespective of any other evidence in the**

present case, therefore, and irrespective of any other error, the District Court's judgments cannot stand."

(Appendix, pp. 144a-145a; emphasis added.)

The Court of Appeals, apparently recognizing the need for an ancillary ground to support reversal, adverted to the jury proceedings at the close of trial.

No fault was found with the trial Court's supplemental instructions to the jury (Appendix, pp. 129a-130a), after which a completely rational verdict was returned for Riss. But the Court of Appeals held that the trial judge had erred in not accepting the earlier verdict, which was returned in defiance of his initial instructions.

In the Court of Appeals' view, the jury "plainly meant" to write "For Defendants" when it wrote "For Plaintiff" opposite the names of the five Respondents. The Court reconstructed the initial general verdict as if it were in answer to special interrogatories, and decided that the jury had intended to find—although the jury did not so state—that Riss had proved its charge of a predatory conspiracy, but had not proved damages. No attempt was made to reconcile those answers with the damage verdict ultimately returned for Riss on unimpeached supplemental instructions.[18]

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[18] In reversing the Third Circuit Court of Appeals and reinstating a District Court judgment for a defendant that had been exonerated by a jury in its answers to special interrogatories, this Court very recently said:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jurys finding inconsistent results in a collision with the Seventh Amendment." *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, et al.*, ... U. S. ..., — (decided April 2, 1962).

REASONS FOR GRANTING THE WRIT.

New law, which would make profound changes in the substance of the antitrust laws and in the conditions of their enforcement, has been created by the Court of Appeals. It has combined an unprecedented expansion of immunity from antitrust prosecution with an unprecedented contraction of the functions of juries and trial judges in antitrust and other complex cases.

A. The Decision Below Is an Unwarranted and Erroneous Extension of the Doctrine Expressed by This Court in ERPC v. Noerr.

The Court of Appeals held that **Noerr** required the conclusion that collusive legislative and law enforcement activities may never be a part of a conspiracy violative of the Sherman Act. Although it couched its interpretation of **Noerr** in terms of erroneous instructions, the Court of Appeals held that evidence of such acts warrants entry of judgment for defendant in antitrust cases. It held that the antitrust relevance of such activities was the "principal question of law" in the trial Court. And it held that the trial Court's instructions, which permitted those activities to be considered as part of a broader Sherman Act violation, required reversal "**irrespective of any other evidence** . . . and irrespective of any other error."

In so defining and disposing of the "principal question," the Court of Appeals held that this Court in **Noerr** granted plenary immunity from Sherman Act prosecution to any "lawful act" conspiracy relying upon evidence of legislative or law enforcement activity, "irrespective of any . . . evidence" of other types of concerted acts normally accepted as a basis for Sherman Act violation.

This interpretation of **Noerr** will have vital and continuing effect upon the nature, and indeed the existence,

of future antitrust litigation, whether initiated privately or by the United States.

Should the view espoused by the Court of Appeals prevail, all would-be monopolists would have an opportunity for creation of boot-straps immunity from antitrust prosecution for concerted price-cutting, boycotting, etcetera. Immunity could be created merely by including in their activities a concerted petition for legislative relief from competition.

The important question—whether that limiting interpretation of the Sherman Act is a valid one—has not been, but should be, settled by this Court.[19]

This aspect of the Court of Appeals' opinion is in direct conflict with the "lawful act" doctrine announced by this Court in **American Tobacco Company v. United States**, 328 U. S. 781 (1946).[20]

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[19] In *Poller v. Columbia Broadcasting System, Inc., et al.*, 368 U. S. 464 (1962), this Court reversed the decision of this same Court of Appeals, which sustained summary judgment for defendants in a private treble damage action claiming damages resulting from an alleged conspiracy where two favorable orders of the Federal Communications Commission were a part of, and apparently essential to, the assertedly successful consummation of the conspiratorial objective. Neither the majority nor the dissenting opinion of this Court suggested that defendants might be accorded immunity merely by utilizing the processes of Government to aid in bringing about circumstances under which the alleged conspiracy would be consummated by wholly private action.

And see, in accord with and anticipating that view, *Slick Airways, Inc. v. American Airlines, Inc., et al.*, 107 F. Supp. 199, 214 (N. J., 1952), appeal dismissed and cert. den., 204 F. 2d 230 (C. A. 3, 1953), cert. den. 346 U. S. 806 (1953); *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626 (E. D. Ill., 1946); *United States v. Association of American Railroads, et al.*, 4 F. R. D. 510 (D. Neb., 1945).

[20] "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition." 328 U. S. 781, 809.

See also *Gibonev v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

As we read **Noerr**, that case sanctions such a holding neither expressly nor by implication. If **Noerr** was in fact intended partially or entirely to overrule the lawful act doctrine of **American Tobacco**, that fact should be made explicit by this Court.

B. The Action of the Court Below in Directing Entry of Judgment for Defendants on a Jury Verdict "For Plaintiff" Represents Such a Radical Departure From Limitations Imposed by the Seventh Amendment and From the Usual Course of Judicial Proceedings as to Require the Exercise of This Court's Supervision.

The Court below held that the jury's initial form of verdict "For Plaintiff," but damages in the amount of "$-None."

> ". . . plainly meant that five of the defendants had conspired and plainly meant, also, that the conspiracy had not damaged Riss. . . . We find no ambiguity in the verdict. Its formal oddity is unimportant" (Appendix, pp. 145a-146a).

It disregarded the verdict "For Plaintiff" and held, **as a matter of law**, that Respondents were entitled to entry of judgment in their favor. If the initial form of verdict was, in fact, merely formally "odd," the Court of Appeals' disposition would nonetheless represent law created for the disposition of this case alone.

The Court below has for at least 60 years consistently taken the position, in the case even of "formally odd" verdicts, that the trial court has a broad discretion alternatively to return the jury to "correct" its verdict or order a new trial, or to interpret the verdict and enter judgment accordingly. **Washington Market Co. v. Clagett**, 19 App. D. C. 12 (1901); **Capital Traction Co. v. Lyon**, 57 App. D. C. 396, 24 F. 2d 262 (1928); **Washington Times Co. v. Bonner**,

66 App. D. C. 280, 86 F. 2d 836 (1936); and see **Grober v. Capital Transit Co.**, 119 F. Supp. 100 (D. C., 1954). In **Freid v. McGrath**, 76 App. D. C. 388, 133 F. 2d 350 (1942) and 77 App. D. C. 385, 135 F. 2d 833 (1943), the District Court's grant of a new trial in the case of a "formally odd" verdict was reversed solely on the ground that the motion for new trial had been untimely filed. The Court of Appeals directed the District Court to vacate the verdict entered after the second trial; to reinstate the "odd" verdict first rendered for plaintiff-appellee and enter judgment thereon. Appellee sought recall of the mandate for an interpretation by the Court of Appeals of the "true verdict" upon which judgment was to be entered. In a 2-1 opinion, the Court of Appeals refused to do so, holding that

> ". . . if any question remains as to what constitutes the true verdict of the jury, **it must be decided by the District Court in the proper exercise of its discretion,** using such information as may be available to it." 135 F. 2d 833, 834. (Emphasis added.)

The dissent in the first opinion insisted that the technicality relied upon by the majority should not have invalidated a new trial, which the trial judge would otherwise have had clear discretion to grant.[21]

The sole Federal Court decision cited by the Court below, supposedly to support its disposition here, actually made a squarely contrary disposition of a verdict for a plaintiff in the sum of "none." **Poydock v. Adams Trans-**

[21] Justice Edgerton said in the second dissent:

> "It seems likely that general verdicts often reflect a jury's misunderstanding or perversion of a judge's instructions. This may be a sufficient reason for more frequent use of special interrogatories. . . . *It is not a sufficient reason for turning a general verdict into a special one by probing a jury's mental processes after a trial is over.*" 135 F. 2d 833, 835 (emphasis added).

fer, 51 F. Supp. 374 (W. D. Pa., 1943). The Court of Appeals failed to report that the trial judge in **Poydock** refused to enter judgment for defendant and exercised his discretion to grant a new trial (see also **Poydock v. Adams Transfer**, 51 F. Supp. 373). That disposition followed the Third Circuit rule, **Andrea v. Dodge**, 28 F. 2d 145 (C. A. 3, 1928), which accorded with that followed by the District of Columbia Circuit until this case was decided. And see **Smyth Sales v. Petroleum Heat & Power Co.**, 141 F. 2d 41 (C. A. 3, 1944).[22]

A total failure to decide material issues in accordance with the trial judge's instructions, rather than "formal oddity," is perfectly apparent on the face of the initial general verdict rendered in this case. That failure is emphasized by the trial context in which the verdict was rendered. The Court of Appeals chose not to note the jury's 11th hour request for damage instructions and its later request to be discharged as hung. Those requests of course suggest that the first verdict was an inexcusable attempt to escape from deadlock by a compromise disposition of material issues—a deadlock resolved by supplemental instructions directing either an unequivocal verdict for defendants or a damage verdict for Riss.

When it presumed to decide what the jury "plainly meant" by a verdict anything but plain in its treatment of the material issues in the case, the Court of Appeals constituted itself an appellate jury. It cloaked itself with an authority never held by any lawfully constituted jury; disregarded the instructions given the trial jury; found the ultimate material facts in the case; and simultaneously held, as a matter of law, that its verdict was apodictic.

Since Riss had prevailed in the trial Court, it did not press its motion for mistrial; it did not move the trial

[22] Compare *Udanovich v. United States*, 365 U. S. 251 (1961).

Court for a new trial, or for judgment notwithstanding the verdict. It had no occasion to create a post-trial record for plenary appeal; and it did not appeal from the favorable judgment.

The Court of Appeals has now converted Riss into an unsuccessful trial Court litigant. It did so in the absence of any practical opportunity, prior to its decision, for Riss to raise on appeal any asserted errors at trial as a ground for reversal of the *nunc pro tunc* adverse verdict and judgment directed by the Court of Appeals. Compare **Milanovich v. United States**, 365 U. S. 551 (1961); **Fountain v. Filson**, 336 U. S. 681 (1949); and **Saunders v. Shaw et al.**, 244 U. S. 317 (1917).

The Court of Appeals purported to decide the issue of jury procedure entirely apart from its disposition of the substantive issues in the case. It did not hold, under the "jury verdict" head of its opinion, that Riss could not have prevailed at trial under any legal theory. It simply held that in its view an appropriate verdict would have been adverse, rather than favorable, to Riss. On that basis it directed entry of adverse judgment.

The Court of Appeals' action represents a radical departure from the accepted and usual course of procedure. Resolution of the issues raised by the behavior of the Court below is of particular importance to trial courts and to litigants in jury trials of antitrust cases. In such cases, lengthy trials and complex issues, often compounded by technical evidence, combine to complicate the jury's duty to reach a unanimous verdict complying in form and substance with the strictures imposed by trial court instructions—instructions that by the nature of such cases can not hope to answer every conceivable question that may arise in jurors' minds. If trial judges in such cases are to be deprived of discretionary power, exercised in light

of their immediate familiarity with the trial context, impartially to direct juries attempting to reach clear verdicts; if litigants are to be deprived of favorable verdicts by appellate redetermination of issues of fact fairly submitted on instructions not held erroneous, trial judges and litigants alike are entitled to a clear statement to that effect by this Court.

The Seventh Amendment to the Federal Constitution does not provide civil litigants in the Federal courts an opportunity to have factual issues determined by appellate courts. It guarantees the right to a trial by jury. The issue here is simply whether that right encompasses the right to a clear verdict reached by a jury pursuant to proper instructions on the law.

This Court stated in **Beacon Theatres, Inc. v. Westover**, 359 U. S. 500 (1959), that the "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 359 U. S. 500, 501. See also **Dimick v. Schiedt**, 293 U. S. 474, 486 (1935).

The initial form of verdict in this case could not have been returned except upon a misapprehension of proper instructions, or an application of erroneous instructions by the trial Court. The Court of Appeals could have found that verdict valid only by disregarding the trial Court's original instructions as a controlling factor.[22] Moreover, it had before it clarifying supplemental instructions by the trial Court, which it did not find erroneous, and which resulted in an unequivocal verdict. In excluding that verdict from consideration, it disregarded its own

[22] In Miranda v. Arizona, 384 U. S. 436, 476 (1966), this Court directed that, where police officers conducting interrogations of suspects in custody fail to give the warnings required by that decision, "no evidence obtained as a result of interrogation can be used against him." See Brants v. United States, 168 U. S. 532, 542 (1897).

prior decisions respecting the discretion of trial Courts even in "formal oddity" cases, as well as the conflict between the final verdict and the one that it had reconstructed. It necessarily disregarded the fact that the final verdict was in entire conformity with the supplemental instructions given. If the final, unequivocal verdict could properly have been disregarded, it could only have been on the ground that the supplemental instructions were erroneous—a finding that the Court below did not make, and could not properly have made.

Riss conceives the guarantee of a jury trial provided by the Seventh Amendment to include the right to a verdict consistent with correct instructions as to the kind of verdict the jury may return.

That concept appears so basic and essential to the operation of the jury system as to require no elaboration. It is elementary that the right to jury trial has not been vindicated where a judgment is entered on an initial verdict contrary to proper instructions, instead of upon a subsequent verdict rendered in conformity with proper instructions.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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